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In the
Supreme Court of the United States

BRUCE PETERS,
Petitioner,
v.
VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & MCTAGGERT, INC.; and JOSEPH MCTAGGERT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE THE COALITION FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER BRUCE PETERS

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Counsel for Amicus Curiae

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Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus Curiae The Coalition for Property Rights ("Coalition") has attempted to secure written consent for the filing of the attached Brief of Amicus Curiae from counsel for the Petitioner and Respondents.[1] Although counsel for Petitioner granted such consent, counsel for Respondents refused to the request of Amicus for written consent pursuant to Supreme Court Rule 37.2(a).2 Accordingly, counsel for Amicus Curiae hereby moves this Court pursuant to Supreme Court Rule 37.2(b) for leave to file the Brief of Amicus Curiae which is submitted herewith.

The Coalition for Property Rights is a public policy, education, and advocacy organization based in Orlando, Florida, which was founded in 2001 to give property owners and property rights a stronger voice. Its mission is to educate the public, elected officials,

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1 Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored the accompanying Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying Brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus states that Counsel of Record for all parties received notice at least ten days prior to the due date of Amicus Curiae's intention to file this Brief.

2 The written consent of Counsel for Petitioners to the submission of the all amicus curiae briefs pursuant to Supreme Court Rule 37.2(a) was lodged with the Clerk of this Court on November 30, 2007. On December 7, 2007, Amicus Coalition contacted James C. Kearns, Esq., counsel for the Respondents, and requested written consent for Amicus to submit the accompanying Brief pursuant to Supreme Court Rule 37.2(a). Counsel for the Respondents indicated by email on December 10, 2007, that he would not consent to the filing of this Brief.

and the courts on the importance of American property rights and to defend these rights from further erosion. The Coalition believes that property rights provide the foundation for individual freedom and economic opportunity and are absolutely vital to economic prosperity.

The Coalition believes that excessive government regulation restricts the creative and constructive use of property, impedes the ability of property owners to respond to free market demands, and ultimately, impedes the ability of average people to realize the American dream. The Coalition draws its membership from a broad cross-section of society, which includes homeowners, land owners, attorneys, real estate professionals, bankers, engineers, architects, accountants, appraisers, farmers, ranchers, builders, manufacturers, business leaders, retirees and even non-landowners.

Central to these rights in private property is a forum in which those rights can be vindicated. But victims of excessive state and local regulations have been effectively barred from federal court in the two decades since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). As such, property owners cannot effectively vindicate their Constitutionally guaranteed rights in local courts, which can often be the subject of electoral, political, or other pressures. Instead, property owners should have a federal forum to protect federally guaranteed rights, and the analysis provided in the attached brief will aid this Court in the consideration of this matter.

Wherefore, the Coalition respectfully requests that this Court grant Amicus Curiae leave to file the accompanying Brief in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires property owners to seek compensation in state courts to ripen a federal takings claim, where four Justices of this Court recognized in *San Remo Hotel v. City and County of San Francisco* that such a rule lacks any legitimate doctrinal basis and causes tremendous and unintended jurisdictional confusion?

2. Is a claim against a traditional physical taking—occurring without any contemporaneous provision of compensation—subject to Williamson County's state procedures ripeness rule, where that rule was articulated in the regulatory takings context, and effectively strips the federal courts of any role in the development of physical takings law?

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BRIEF OF AMICUS CURIAE THE COALITION FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus Curiae The Coalition For Property Rights ("Coalition") seeks to bring to the Court's attention its views, and those of its members, concerning the vital need for a federal forum in which individual property owners can vindicate their federally protected right to just compensation under the Fifth Amendment to the United States Constitution.[1]

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1 Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary

The Coalition for Property Rights is a public policy, education, and advocacy organization based in Orlando, Florida, which was founded in 2001 to give property owners and property rights a stronger voice. Its mission is to educate the public, elected officials, and the courts on the importance of American property rights and to defend these rights from further erosion. The Coalition believes that property rights provide the foundation for individual freedom and economic opportunity and are absolutely vital to economic prosperity.

The Coalition believes that excessive government regulation restricts the creative and constructive use of property, impedes the ability of property owners to respond to free market demands, and ultimately, impedes the ability of average people to realize the American dream. The Coalition draws its membership from a broad cross-section of society, which includes homeowners, land owners, attorneys, real estate professionals, bankers, engineers, architects, accountants, appraisers, farmers, ranchers, builders, manufacturers, business leaders, retirees and even non-landowners.

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contribution intended to fund the preparation or submission of this Brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for *Amicus* states that Counsel of Record for all parties received notice of Amicus Curiae's intention to file this Brief at least ten days prior to the due date. Counsel for Petitioner consented to the filing of this Brief in a "blanket consent" lodged with this Court November 30, 2007, while counsel for Respondent withheld consent. Pursuant to Supreme Court Rule 37.2(b), counsel for Amicus Curiae moved for leave to file this Brief, which motion is bound together with this Brief.

Central to these rights in private property is a forum in which those rights can be vindicated. But victims of excessive state and local regulations have been effectively barred from federal court in the two decades since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). As such, property owners cannot effectively vindicate their Constitutionally guaranteed rights in local courts, which can often be the subject of electoral, political, or other pressures. Property owners should have a federal forum to protect federally guaranteed rights, and the analysis provided in the attached brief will aid this Court in the consideration of whether to grant the petition for certiorari.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case contained in the Brief of Petitioner Bruce Peters.

SUMMARY OF ARGUMENT

This Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) has been the subject of much confusion in the lower federal courts. There is sharp disagreement on whether *Williamson County* presents a mandatory ripeness rule or an optional prudential rule, whether it applies to all takings claims or only to regulatory takings claims, and whether it applies to other constitutional claims involving government harm to property. *Williamson County* also inequitably bars property owners from vindicating their federally protected rights in federal court—a burden not

placed on any other constitutional or statutory right. This case presents the Court with an opportunity to solve all of these problems in one fell swoop by accepting Chief Justice Rehnquist's suggestion to reexamine *Williamson County*. *See San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J. concurring).

ARGUMENT

I. *Williamson County* Has Produced Jurisprudential Chaos in the Lower Federal Courts

As has been well documented by petitioner and other amici, *Williamson County* is of dubious textual parentage and rests on the equivalent of jurisprudential quicksand. This brief thus focuses not on the historical merits of the *Williamson County* "state litigation" ripeness rule, but rather on the practical disaster that has resulted in the short 22 years since its creation. While it was perhaps an admirable idea in the abstract, forcing property owners to "ripen" their federal takings claims by first litigating identical, state-based claims in state court, the rule has raised far more issues than it resolved. The result has been conflicts among the federal circuit courts of appeals and state supreme courts, a labyrinthine maze of procedures for property owners, and endless petitions to this Court to sort out the countless details in the Rube Goldberg scheme[2] that

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2 *See* http://www.rube-goldberg.com/. According to Merriem-Webster's Online Dictionary, a Rube Goldberg scheme involves "accomplishing by complex means what seemingly could be

now makes up federal takings litigation. This Court should overrule *Williamson County* as suggested by the four-justice concurrence in *San Remo*. *See San Remo Hotel v. City and County of San Francisco*, 545 U.S. at 348.

A. Federal Courts are Divided Over Whether *Williamson County's* State-Litigation Requirement Is A Prudential Rule Or Is Based in Article III

Many Circuit Courts of Appeals consider *Williamson County's* state procedures rule to be "prudential," meaning that it can be waived by the government defendant or that the Court could simply decline to apply it in appropriate circumstances. *See*, e.g., *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County's* ripeness requirements are prudential in nature"); *see also Asociación de Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 (1st Cir. 2007) ("For multiple reasons, the *Williamson County* prudential ripeness concerns are inapposite here"); *Washlefske v. Winston*, 234 F.3d 179, 182 (4th Cir. 2000); *Beverly Boulevard LLC v. City of West Hollywood*, 238 Fed.Appx. 210 (9th Cir. 2007) ("Williamson sets forth a prudential rule, and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits.") (citing *Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001)). Other Courts have decided that *Williamson County* is a matter of

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done simply."

Article III ripeness, which, when unsatisfied, bars the Court from hearing the case under almost all circumstance. *See*, e.g., *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (declaring that *Williamson County* ripeness defense could not be waived because that "would require the Court to refuse to consider whether it has subject matter jurisdiction over the case" and collecting cases); *see also Bauknight v. Monroe County, Fla.*, 446 F.3d 1327, 1331 (11th Cir. 2006) (noting, in a takings case, that "Ripeness is an issue of subject matter jurisdiction.").

The distinction between prudential ripeness and Article III ripeness is, of course, critical.[3] As the Eighth Circuit correctly notes, Article III problems with a case go to the power of the Court to hear the case, and can almost never be waived. Article III ripeness, for example, may be raised for the first time on appeal, or even before this Court. *See*, e.g., *DBSI/TRI IV Ltd. Partnership v. United States*, 465 F.3d 1031, 1037-38 (9th Cir. 2006); *see also Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health and Rehab. Serv.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000).

The significance of the Article III/prudential distinction is demonstrated in a recent order of the United States District Court for the Northern District of California. In *Yamagiwa, et al., v. City of*

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3 Petitioner's brief amply demonstrates the "removal" trap, which amici will not discuss. *See* Pet. Br. at 21-24.

Half Moon Bay, et al., (N.D. Cal Docket No. C 05-4149 VRW), the defendant city removed the plaintiff landowner's case to federal district court under 28 U.S.C. § 1331 due to the presence of a Fifth Amendment takings claim in the Complaint. *See Yamagiwa* at ¶ 368. After significant discovery, including 47 depositions, nine experts, and a bench trial, but prior to the verdict, the defendant city moved the district court to remand the case to state court based on *Williamson County*. *See id.* at ¶ 367. Holding that *Williamson County* was merely a prudential doctrine measuring whether the issues were "fit for judicial decision," *id.* at ¶ 364, the district court deemed the prudential requirements satisfied and proceeded to judgment. The result: A $36,750,000 judgment for the property owner. Had the Half Moon Bay case been in the Northern District of Iowa instead of the Northern District of California, the Court would have been compelled to dismiss the case or, at best, remand it to state court, permitting the City to "take its chips off the table because it didn't like the dealer's hand." Id. at ¶ 368.

Given the inequity of these differing rules for vindicating Fifth Amendment rights caused by the circuit split, this Court will surely be assailed with petitions to resolve this important question—a question which would not need resolving if *Williamson County* were overruled.

B. Even Courts Agreeing That *Williamson County* Is Prudential Cannot Agree When to Apply It.

Even if this Court eventually solves the Article III/prudential debate, it will find itself mired in petitions seeking to resolve the Circuit split over when prudence requires application of the rule and when it does not. A recent decision of the First Circuit, for example, declared that *Williamson County* was only applicable to *regulatory* takings—not the kind of physical takings at issue in that case and in this case. *Flores Galarza,* 484 F.3d at 15. But five months later, the Seventh Circuit expressly rejected *Flores Galarza* and strongly suggested that *Williamson County's* procedures apply to all takings cases. *Peters v. Village of Clifton*, 498 F.3d at n.6.

The Ninth Circuit has held that the Fifth Amendment's takings clause subsumes or "preempts" substantive due process claims. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996) (en banc).[4] That is, a due process claim involving harm to property of any kind is subjected to *Williamson County*, even if no takings claim is alleged and even if no takings claim could succeed. *Armendariz*, 75 F.3d at 1324 n.9 & 1325.

Other Circuits have rejected the Ninth Circuit's approach. *See*, e.g., *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C.Cir.1997) ("[T]he requirements of the takings

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4 Based on this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Ninth Circuit recently held "that *Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed." *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007).

clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition."). Some circuits have continued to analyze the different challenges (takings, substantive due process, equal protection, etc.) separately without discussion of *Williamson County*. *See*, e.g., *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 611 (11th Cir. 1997) (determining that there is no independent "substantive due process taking" cause of action and separately analyzing the plaintiff's takings, substantive due process, and equal protection claims).

Some circuits have explicitly limited *Williamson County* to takings claims. *See*, e.g., *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims" (citations omitted)). Others have held that *Williamson County* applies to substantive due process and takings claims but not equal protection claims. *See*, e.g., *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). *See Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). And still others extend *Williamson County* to takings, substantive due process, and equal protection claims. *See Dougherty v. Town of No. Hempstead Bd. of Zoning App.*, 282 F.3d 83, 88 (2d Cir. 2002).

These inconsistent approaches to takings

jurisprudence are creating ever-expanding confusion in the district and circuit court; overruling *Williamson County* would resolve that confusion but, short of that, further direction from this Court on the scope of *Williamson County's* application will be necessary.

C. Even When *Williamson County* Applies, the Circuits Cannot Agree When Its Has Been Satisfied.

Even if this Court resolved the questions above—

> (a) whether *Williamson County* is a prudential doctrine or a mandatory, Article III requirement;
> (b) to which claims do the *Williamson County* procedures apply (takings, due process, etc); and
> (c) to which kind of takings do the *Williamson County* procedures apply (regulatory vs. physical, facial vs. as applied, etc.)

—there is still the difficult task of figuring out *how* to apply it. Chief Justice Rehnquist's concurrence in *San Remo* pointed out that the Court has referred to *Williamson County* as a "prudential" requirement, though he also noted that the question was still open. 545 U.S. at 349 & 350 n.2. Assuming that it *is* a procedural requirement, the lower federal courts are likely to find themselves spending a fair amount of time trying to sort out just when *Williamson County* has been satisfied.

Recent case law suggests that the federal

courts are unlikely to agree. Leaving aside the courts holding that *Williamson County* is a mandatory Article III doctrine, even the "prudential" courts have developed sharp disagreements. The First Circuit, for example, has determined that *Williamson County*'s procedures does not include litigation at all:

> In our view, such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law. Rather, the Supreme Court must have had in mind only those procedures specifically designed by the state to avoid constitutional injury in the first instance by providing a means for a plaintiff to obtain compensation for the government's taking of property. *Flores Galarza*, 484 F.3d at 17.

Thus, it seems, the First Circuit is willing to hear takings claims so long as all administrative avenues of relief have been cut off. Not so in the Seventh Circuit. While explicitly recognizing *Williamson County* as a prudential doctrine, the Court below in this case explained that it was not "free to disregard" the requirements and that "this court is bound to follow" them. *Peters*, 498 F.3d at 734; *see also id.* at (rejecting *Flores Galarza*, 484 F.3d at 17). Evidently the rule in the Seventh Circuit is that Williamson is a prudential doctrine, but prudence has no place in its application. The Northern District of California has taken a "middle of the road" approach, deeming

Williamson County satisfied so long as the matter is "fit for judicial decision." See *Yamagiwa*, supra, at ¶ 364. It may well be that none of these approaches is correct, and that some other test is required. But all that will have to be worked out in the lower federal courts, no doubt with this Court's repeated intervention.

In addition to the above, there are countless other disputes awaiting this Court if it does not put *Williamson County* out of its misery. The Court may be asked to decide whether *Williamson County* prohibits pendent jurisdiction over a state court takings claim if there is another valid federal claim under 28 U.S.C. § 1367. *See*, e.g., *Johnson v. City of Shorewood, Minnesota*, 360 F.3d 810, 820 (8th Cir. 2004) (suggesting that decision to dismiss state takings claims after dismissing all federal claims was discretionary); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 692 (9th Cir. 1993) (same). Or the Court may be asked to resolve the dispute over whether litigating a state takings claim results in claim preclusion or mere issue preclusion. *Compare Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989) and *Wilkinson v. Pitkin County Bd.*, 142 F.3d 1319 (10th Cir. 1998) *with DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) and *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

This Court's decision in *Williamson County* threatens to leave the federal courts a thicket of procedural questions, further stretching their already limited resources. Property owners are

presently condemned to procedural purgatory, never getting a full and fair adjudication of their claims. These procedural hurdles also have a "chilling effect"—it might be worth the expense and rigors of litigation for a $36 million claim, but not for a $100,000 claim. The Coalition often finds itself standing beside small property owners who are outnumbered and outgunned by government lawyers and "community advocates" pushing for greater regulation. The Court should remove the *Williamson County* entry barriers, and allow federal courts to act as guardians of these federally protected rights.

Once the underlying taking is complete and compensation is not paid, a federal takings claim is ripe. Any attempt to avoid this straight-forward reading of the Fifth Amendment leads to the chaos and jurisprudential train-wreck evident in the past 22 years. This Court should solve the problem by accepting the late-Chief Justice's invitation to overrule *Williamson County* and permit property owners to file their federal takings claims in federal court.

II. Property Owners Like Mr. Peters Deserve A Federal Forum in Which to Vindicate Their Federally Protected Rights

"It seems scarcely to admit of controversy," Alexander Hamilton wrote in Federalist 81, "that the judiciary authority of the United States ought to extend to . . . all those [cases] which concern the execution of the provisions expressly contained in" the Constitution. The Fifth Amendment expressly and rather prominently places protection of private property at the very heart of the Constitution. But the intersection of *Williamson County* and *San* Remo has inadvertently consigned virtually all takings claims to the state court. This is unfair to property owners who merely seek their day in federal court to protect their federal rights.

Mr. Peters seeks only to vindicate his right to exclude government from using his property for sewage overflow. As recognized by the Court below, there does not appear to be a ready procedure in the Illinois courts for Mr. Peters to seek compensation. But the 7th Circuit still ordered Mr. Peters to state court because there was no "explicit authority from the Illinois courts" stating that "no state remedy was available for takings." *Peters*, 498 F.3d 729. That is, Mr. Peters and other property owners are required to prove the negative by litigating for years in state court before any federal court will consider their claims.

California property owners face an even worse procedural whipsaw. Property owners wrongly denied a permit which results in a taking cannot sue immediately for compensation in state court.

Rather, they must challenge the decision with an administrative writ under California Code of Civil Procedure §§ 1085 or 1094.5. Assuming that the permit was wrongly denied, the state trial courts will order the local agency to grant the permit, ending any permanent takings claim. *See Landgate, Inc. v. California Coastal Com'n*, 17 Cal.4th 1006, 1013-14; 73 Cal.Rptr.2d 841 (Cal. 1998). Under this Court's decisions, property owners should be able to bring a temporary takings claim for the several years during which the owners had no use of their properties. But California has decided that litigation over the validity of the government's action is merely a "normal part of the regulatory process" and thus exempt from any takings claim. *Id.* at 1031. As such, it is virtually impossible for a landowner to obtain compensation for a taking of private property. At most, property owners may get the use of their property back, but only after years of expensive litigation and with no compensation for the intervening loss.

Resort to federal court is also important given the life tenure of federal judges. Unlike many elected state judges[5] who may be "too little independent" as recognized in Federalist 81, life-tenured federal judges may decide cases free from local pressures. In the recent *Yamagiwa* decision from the Northern District of California, the Court found a taking and awarded $36.75 million for the taking of private property—an amount within the range of both the City's and plaintiff's experts. But

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5 California's Superior Court (trial) judges run in non-partisan elections.

this award is more than triple the annual budget of the City, and press accounts report that the City has held "closed door" meetings with all employees to discuss matters such as job security, and has hinted that the ruling may cause the City to go bankrupt. *See* San Mateo Daily Journal, *City loses $36M lawsuit*, http://www.smdailyjournal. com/article_ preview.php?id=83957 (last visited December 13, 2007). The district judge was no doubt aware of the economic impact of his decision, but followed the law as required. And though much-maligned in those same press accounts, the district judge is insulated from pressure or influence by life tenure.

As Hamilton put it in Federalist 78, the "inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission." An elected California Superior Court judge, however, would certainly have felt intense pressure and would likely have faced electoral consequences for making the right decision. A federal forum frees the life-tenured judge from such concerns, and provides the property owner and the public with assurance of a full and fair hearing dedicated to reaching the just result.

In light of the above, property owner owners like Mr. Peters and the members of Amicus Coalition For Property Rights deserve their day in federal court. As such, this Court should grant Mr. Peters' petition and accept Chief Justice Rehnquist's suggestion to reexamine *Williamson County*.

Conclusion

For the foregoing reasons, this Court should grant Mr. Peters' petition for a writ of certiorari.

Respectfully submitted,
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